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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGGORY BARNES,

Defendant and Appellant.

E033657

(Super.Ct.No. FMB005593)

OPINION

APPEAL from the Superior Court of San Bernardino County. James C. McGuire, Judge. Affirmed in part, reversed in part and remanded with directions.

Martha L. McGill, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, and Lise Jacobson, Deputy Attorney General, for Plaintiff and Respondent.

An amended information charged defendant Gregory Barnes with manufacturing methamphetamine (Health & Saf. Code, § 11379.6, subd. (a)) and possessing ephedrine

or pseudoephedrine with intent to manufacture methamphetamine and an analog (Health & Saf. Code, § 11383, subd. (c)(1)). The amended information alleged he had sustained two prior convictions in the State of Tennessee that qualified as strikes under the “Three Strikes” law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12). A jury found he was guilty of both charges and the prior conviction allegations were true. The trial court sentenced him to 25 years to life under the Three Strikes law on the manufacturing conviction and stayed the possession conviction pursuant to Penal Code section 654.

On appeal, defendant contends, and the People concede, that the trial court erroneously denied his motion to dismiss one of the two prior strike allegations. He argues, and the People agree, that the record does not establish that his Tennessee conviction for aggravated assault (Tenn. Code, § 39-13-102) qualifies as a strike.

Under the Three Strikes law, a prior conviction qualifies as a strike if it is a serious felony as defined in Penal Code section 1192.7, subdivision (c), or a violent felony as defined in Penal Code section 667.5, subdivision (c). (Pen. Code, §§ 667, subd. (d)(1), 1170.12, subd. (b)(1); *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1525.) A prior conviction in another jurisdiction qualifies as a strike if the conviction is “for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.” (Pen. Code, §§ 667, subd. (d)(2), 1170.12, subd. (b)(2)). The prosecution has the burden of proving the prior strike conviction beyond a reasonable doubt. (*People v. Tenner* (1993) 6 Cal.4th 559, 566.)

When the statute under which the defendant was previously convicted may be

violated in different ways, some of which would not qualify as a strike, the prosecution must establish the prior offense “involved conduct which satisfies all of the elements of the comparable California serious felony offense.” (*People v. Myers* (1993) 5 Cal.4th 1193, 1195.) In determining whether a conviction in another jurisdiction qualifies as a strike, the court considers the entire record of the prior conviction, including documents which reliably reflect the conduct for which the defendant was convicted, subject to the rules of evidence and other statutory limitations. (*People v. Myers, supra*, 5 Cal.4th at p. 1201.) When the record of the prior conviction does not establish the facts of the offense, the court will presume the conviction was for the least adjudicated elements of the charged offense. (*People v. Luna* (2003) 113 Cal.App.4th 395, 398; *People v. Cortez* (1999) 73 Cal.App.4th 276, 280.) If the least adjudicated elements do not establish a strike felony under California law, the prior conviction may not be used as a strike. (*People v. Cortez, supra*, 73 Cal.App.4th at p. 280.)

In the case before us, the prosecution alleged defendant’s Tennessee conviction of aggravated assault (Tenn. Code, § 39-13-102) qualified as a strike under the Three Strikes law. As relevant here, assault qualifies as a strike if it is an assault with a deadly weapon, firearm, machine gun, assault weapon or semiautomatic firearm or on a peace officer or firefighter (Pen. Code, § 1192.7, subd. (c)(31)) and those in which the defendant personally inflicts great bodily injury or uses a firearm (Pen. Code, § 1192.7, subd. (c)(8); see *People v. Luna, supra*, 113 Cal.App.4th at p. 398). The Tennessee statute under which defendant was convicted provides in pertinent part: “A person

commits aggravated assault who: [¶] (1) Intentionally or knowingly commits an assault as defined in § 39-13-101 and: [¶] (A) Causes serious bodily injury to another; or [¶] (B) Uses or displays a deadly weapon; or [¶] (2) Recklessly commits an assault as defined in § 39-13-101(a)(1), and: [¶] (A) Causes serious bodily injury to another; or [¶] (B) Uses or displays a deadly weapon.”

The elements of aggravated assault in violation of the Tennessee statute are: “(1) *mens rea*; (2) commission of an assault . . . ; and (3)(a) serious bodily injury or (b) use *or* display of a deadly weapon.” (*State v. Hammonds* (Tenn. 2000) 30 S.W.3d 294, 298; italics added.) Thus, the statute may be violated either by causing serious bodily injury or using or displaying a deadly weapon. (*Ibid.*) A Tennessee aggravated assault conviction for displaying a deadly weapon would not qualify as a strike under California law. (Pen. Code, § 1192.7, subd. (c)(8), (c)(31).)

Defendant testified during trial that he was convicted of aggravated assault in Tennessee on December 11, 1991, and the Tennessee record established he pled guilty to aggravated assault in violation of Tennessee Code section 39-13-102. The record does not reveal whether he personally caused serious bodily injury, used a deadly weapon or displayed a deadly weapon. Consequently, as the People concede, it must be presumed defendant was convicted of the least offense punishable under the Tennessee statute. (*People v. Cortez, supra*, 73 Cal.App.4th at p. 280.)

In view of the foregoing, the finding on the prior Tennessee aggravated assault conviction allegation must be reversed, the sentence vacated, and the matter remanded for

a possible retrial and resentencing. (See *People v. Barragan* (2004) 32 Cal.4th 236, 239; *People v. Cortez, supra*, 73 Cal.App.4th at pp. 286-287.)

DISPOSITION

The judgment is affirmed, except that the true finding as to the allegation that defendant sustained a Tennessee conviction for aggravated assault pursuant to the Three Strikes law is reversed, his sentence is vacated, and the matter is remanded for a possible new trial as to the allegation, a new sentencing hearing, and for further appropriate proceedings not inconsistent with this opinion.

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HOLLENHORST

Acting P. J.

We concur:

RICHLI

J.

GAUT

J.